

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6156

ORIGINAL

IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BROOKHAVEN CABLE TV INC.; CAPTIOL
CABLEVISION INC.; SAMSON CABLEVISION
CORP.; TELEPROMPTER CABLE SYSTEMS,
INC.; WARNER CABLE OF OLEAN, INC.;
NATIONAL CABLE TELEVISION ASSOCIATION,
INC.; NEW YORK STATE CABLE TELEVISION
ASSOCIATION, and HOME BOX OFFICE, INC.,

Appellees,

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION,

Intervenors-Appellees,

- against -

ROBERT F. KELLY, Chairman; JERRY A.
DANZIG, Vice Chairman; MICHAEL H.
PRENDERGAST; ELI WAGNER; and EDWARD
J. WEGMAN, Commissioners of the NEW
YORK STATE COMMISSION ON CABLE TELE-
VISION,

Appellants,

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS

Intervenor-Appellant,

CITY OF NEW YORK

Amicus-Curiae.

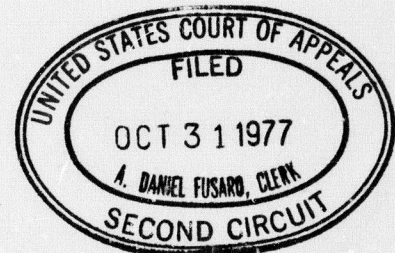
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Docket No.

77-6156

77-6157

P/S



ON APPEAL FROM A
DECISION OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK

BRIEF OF THE
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ISSUES PRESENTED FOR REVIEW	2
REFERENCES TO PARTIES AND RULINGS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE FEDERAL COMMUNICATIONS COMMISSION HAS NO JURISDICTION TO PREEMPT STATE REGULATION OF PAY CABLE RATES	8
II. EVEN ASSUMING <u>ARGUENDO</u> , THAT THE FEDERAL COMMUNICATIONS COMMISSION HAS THE JURIS- DICTION TO PREEMPT STATE REGULATION OF PAY CABLE, IT HAS NOT DONE SO WITH REGARD TO RATES CHARGED FOR PAY CABLE	19
III. ASSUMING <u>ARGUENDO</u> , THAT THE FEDERAL COMMUNI- CATIONS COMMISSION HAS ACTUALLY ATTEMPTED TO PREEMPT STATE REGULATION OF RATES FOR PAY CABLE, SUCH ACTION MUST FAIL SINCE THE FEDERAL COMMU- NICATIONS COMMISSION HAS NOT MET THE HIGH STAN- DARDS NECESSARY TO PREEMPT STATE REGULATION OF LOCAL FACILITIES	28
CONCLUSION	29
ADDENDUM	
Chapter 466 of the Laws of 1972 of the State of New York, Article 28 (Sections 811-831)..A-1	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>American Civil Liberties Union v. FCC,</u> 523 F. 2d 1344 (9th Cir., 1975)	15,16
<u>Bethlehem Steel Co. v. New York Labor Relations Board,</u> 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026 (1946) ...	27
* <u>Brookhaven Cable TV, Inc., et al. v. Robert F. Kelly,</u> et al., Dkt. No. 76-CV-154 (U. S. D. C., N. D. N. Y., 1977)	2,11,12,13,14,15 16,19,20,21,22
<u>Chicago V. Atchison, T. & S. F. R. Co.,</u> 357 U.S. 77, 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958)	27
<u>Chicago, M., St. P & P. R.R. v. Illinois,</u> 355 U.S. 300, 2 L. Ed. 2d 292, 78 S. Ct. 304 (1958)	29
<u>Citizens to Preserve Overton Park, Inc. v. Volpe,</u> 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971)	24
<u>City of Chicago v. FPC,</u> 458 F. 2d 731 (1971), cert. denied, 405 U.S. 1074, 31 L. Ed. 2d 808, 92 S. Ct. 1495 (1972)	25
<u>Cooley v. Board of Wardens,</u> 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851)	8,20
<u>Florida v. United States,</u> 282 U.S. 194, 75 L. Ed. 291, 51 S. Ct. 119 (1931)	29
* <u>Head v. New Mexico Board,</u> 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963)	8,20
* <u>Home Box Office, Inc. v. FCC et al.,</u> No. 75-1280, et al., (D. C. Cir., 1977), cert. denied, No. 76-1841 (October 3, 1977)	16,17,18,19 22,23,24,26
* <u>National Association of Regulatory Utility</u> <u>Commissioners v. FCC,</u> 533 F. 2d 601 (D. C. Cir., 1976)	15,16
<u>National Association of Theatre Owners v. FCC,</u> 420 F. 2d 194 (D. C. Cir., 1969), cert. denied 397 U.S. 922 (1970)	12,13,14,15
<u>National Nutritional Foods Ass'n v. Weinberger,</u> 512 F. 2d 688 (2d Cir., 1975), cert. denied 423 U.S. 827, 46 L. Ed. 2d 44, 96 S. Ct. 44 (1975)	24
<u>North Carolina v. United States,</u> 352 U.S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260 (1945)	29

CASESPages

<u>Oregon-Washington Railroad & Navigation Co. v. Washington</u> , 270 U.S. 87, 70 L. Ed. 482, 46 S. Ct. 279 (1926)	27
<u>Pacific Gas and Electric Co. v. FPC</u> , 506 F. 2d 33 (D. C. Cir., 1974)	21
<u>Springfield Television, Inc. v. City of Springfield</u> , 428 F. 2d 1375 (1970)	20,21
<u>TV, Pix, Inc. v. Taylor</u> , 304 F. Supp. 459 (D. Nevada, 1968) aff'd 396 U.S. 556, 24 L. Ed. 2d 746, 90 S. Ct. 749 (1970)	8,20
* <u>United States v. Midwest Video Corp.</u> , 406 U.S. 649 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972)	10,11,16,17,19
* <u>United States v. Southwestern Cable Co.</u> , 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968)	7,9,10,11,16,17
<u>Utah Public Service Commission v. United States</u> , 356 U.S. 421, 2 L. Ed. 2d 886, 78 S. Ct. 796 (1958) ...	29
<u>Weinberger v. Alynson, Westcott and Dunning</u> , 412 U.S. 609, 37 L. Ed. 2d 207, 93 S. Ct. 2469 (1973)	24

STATUTES

<u>Administrative Procedure Act</u>	
5 U.S.C. § 706(2) (A)	23
5 U.S.C. § 706(2) (E)	24
<u>Communications Act of 1934, as amended:</u>	
47 U.S.C. § 151 <u>et seq.</u>	7,9,18,21,27
<u>Chapter 466 of the Laws of 1972 of the State of New York, Article 28</u>	
(Sections 811-831)	4

MISCELLANEOUS

<u>Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry</u>	
46 F.C.C. 2d 175 (April 14, 1974)	3
<u>Clarification of Commission Policy, In the Matter of Rates Charged by Cable Television Companies for "Auxiliary" Programming [Docket No. 90010, March 1, 1976]</u>	4,5,6

MISCELLANEOUS

47 C. F. R. § 76 <u>et seq.</u>	21
47 C. F. R. § 76.225 (1975)	17,19,26

* Cases or authorities chiefly relied upon are marked by asterisks.

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ON APPEAL FROM A
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OF NEW YORK

BRIEF OF THE
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners
hereby submits its brief in the above-captioned case.

ISSUES PRESENTED FOR REVIEW

1. Whether the United States District Court for the Northern District of New York erred in ruling that the Federal Communications Commission has the jurisdiction to preempt State regulation of rates charged for pay cable television.

2. Whether the United States District Court for the Northern District of New York was correct in holding that the Federal Communications Commission has, in fact, preempted State regulation of pay cable television rates.

This case has not previously been before this Court.

REFERENCES TO PARTIES AND RULINGS

This proceeding involves an appeal of an order of the United States District Court for the Northern District of New York, issued on March 9, 1977, entered on May 12, 1977, by the Honorable Judge Edmund Port, in the case of Brookhaven Cable TV, Inc., et al., v. Robert F. Kelly, et al., Docket No. 76-CV-154. This decision, which has not yet been generally reported, appears in the Joint Appendix at p. 150 ^{1/}

The other appellant in this proceeding, in addition to the National Association of Regulatory Utility Commissioners, are the Commissioners of the New York State Commission on Cable Television, as represented by the Attorney General's Office of New York. The City of New York appeared as amicus curiae in the lower court.

The appellees include the cable television companies which instituted this proceeding in the lower court, the Federal Communications Commission, and the United States of America, as represented by the

^{1/} The appellants to this appeal have joined in preparing a Joint Appendix which has been separately bound in a companion volume, hereinafter cited as J. A.

United States Department of Justice.

STATEMENT OF THE CASE

Cable television was developed over 30 years ago basically to provide retransmission of over-the-air broadcast signals to persons who, because of location, could not adequately receive a direct signal. These individuals would subscribe to cable services for a flat monthly fee. As cable became more sophisticated, additional services were added including the transmission of locally originated programming and informational programming.

Within the past five years, cable companies have been offering an additional service, at a separate rate, over non-broadcast programming channels. This service, known as "pay cable", is offered at a per-program or per-channel charge, and enables subscribers to view first run movies and sports events, without commercials, not available to the general public through conventional television broadcasting.

From a regulatory point-of-view, there is no major difference between the two types of services, yet, the FCC has specifically ruled that localities should regulate the rates of ordinary subscriber cable television, whereas, the FCC has allegedly preempted local/State regulation of pay cable rates. (See, for example, Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C. 2d 175, 199-200 [April 17, 1974]).

In 1972, Article 28 of the New York Executive Law was enacted to provide for the comprehensive regulation of cable television companies operating within New York. [Chapter 466 of the Laws of 1972 of the State of New York]. To administer the provisions of this new law, the New York State Commission on Cable Television (State Commission) was established.

Executive Law, Article 28, confers upon the State Commission various duties and responsibilities concerning the franchising process and the content of franchise agreements (Executive Law, § 815). Executive Law, Section 825, provides, in part, that the rates charged by a cable television company must be those specified in its franchise agreement and cannot be changed except by amendment of the franchise. Executive Law, Section 822, provides that no amendment of a franchise agreement is effective without the approval of the State Commission. Executive Law, Section 821, provides that no person shall exercise a franchise, nor shall any franchise be effective, until the State Commission has confirmed the franchise by issuing a certificate of confirmation.

On March 1, 1976, the State Commission issued a Clarification of Commission Policy which stated, in pertinent part:

1. All subscriber rates imposed by cable television companies in New York must be authorized by the local franchise held by such companies, as required by Section 825 of the Executive Law.
2. No change in subscriber rates may be adopted without an appropriate amendment of the governing franchise.
3. Any such franchise amendment must be approved by this Commission before it may be effective, as provided in Section 822 of the Executive Law.
4. No exclusion or exemption from the above is provided by State Law for rates for any pay, auxiliary or subscription cable service.

5. Cable television companies that have already established pay cable services without following the appropriate legal requirements, as described above, will not be required at this time to make immediate efforts to amend their respective franchises. Such companies must however, file a formal notice with their respective municipalities and this Commission within the next two months, describing the nature of their pay cable services and the rates currently charged to subscribers for such services. Those cable television companies providing pay cable services and not so on record with their respective municipalities and this Commission by April 30, 1976, will face appropriate sanctions.
6. Active enforcement of these policies will be undertaken.

Clarification of Commission Policy, In the Matter of Rates Charged by Cable Television Companies for "Auxiliary" Programming (Docket No. 90010, March 1, 1976) [hereinafter cited as Clarification or Clarification of Commission Policy].

In response to this Clarification of Commission Policy, an action was instituted by the plaintiff-appellees, five cable television system companies, two trade associations, and Home Box Office, Inc., a supplier of pay cable programming to cable television systems. In their complaint, filed April 7, 1976, the appellees, attempting to challenge the power of the State Commission to regulate the prices charged for pay cable, asserted four claims of relief: that the Clarification was in violation of the Supremacy Clause of the Constitution of the United States (art. VI, cl. 2), the Commerce Clause (art. I, § 18, cl. 3), the First Amendment (free speech), and the Fourteenth Amendment (equal protection).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, appellees moved, on April 30, 1976, for summary judgement on the first claim of relief, that the Federal Communications Commission [FCC] has preempted State regulation of rates charged for pay cable. In addition, the appellees sought to enjoin the Commissioners of the State Commission from implementing the Clarification.

On April 30, 1976, the Commissioners, by their attorney the Attorney General of the State of New York, filed an answer and a cross-motion for summary judgement seeking a declaration that the Commission's Clarification does not violate the Supremacy Clause of the United States Constitution.

On June 4, 1976, the National Association of Regulatory Utility Commissioners (NARUC) filed a motion to intervene, an answer, and a memorandum of law in support of defendant-appellants' cross-motion for summary judgement. NARUC's motion, as well as the FCC's motion to intervene for the cable companies, was subsequently granted by the court. In addition, a motion submitted by the City of New York seeking leave to participate in the proceeding as amicus curiae was also granted.

Briefs were filed and oral argument was heard before Judge Port on June 14, 1976. In his decision, entered on May 12, 1977, Judge Port granted the appellees' motion for summary judgement holding that State regulation of rates charged for pay cable has been effectively preempted by the FCC.

The court found that the case turned upon whether or not the FCC's jurisdiction over pay cable rates was reasonably ancillary to the FCC's regulation of television broadcasting. Answering this question in the affirmative, the court thus held that the FCC did indeed have jurisdiction over pay cable rates.

SUMMARY OF ARGUMENT

It is the NARUC's contention that, contrary to the holding of the U. S. District Court for the Northern District of New York, the FCC does not have the requisite jurisdiction to preempt State regulation of rates charged for pay cable television. The FCC can

certainly not find any preemptive authority in the Communications Act (47 U.S.C. § 151 et seq.). In addition, the FCC has not and can not meet the historical tests established for Federal preemption of State regulatory authority.

The NARUC submits that the standards establishing any FCC control over CATV have been established through judicial interpretation. The major standard so established is the "ancillary to the regulation of broadcasting" test of United States v. Southwestern Cable Co., 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968). The NARUC contends that the FCC's alleged preemption of pay cable rates can not meet this test and thus such attempted preemption must fail. Moreover, the NARUC argues that the cases construing this test narrow the standard even further making alleged FCC preemption of pay cable rates even more questionable.

In addition, the NARUC submits that even assuming for the sake of argument that the FCC does have the requisite jurisdiction to preempt State regulation of pay cable, it has not done so with regard to rates charged for pay cable television. It is the NARUC's belief that any FCC statements on the issue in question have not been definitive regulations, but mere policy statements not capable of preempting State regulation.

Furthermore, the NARUC contends that the FCC, assuming it has preempted State regulation, has not demonstrated an adequate need for such preemption and thus, the FCC actions are invalid. Moreover, the NARUC submits that any alleged FCC preemption herein was for the sole purpose of precluding State involvement and that this violates well-established principles of law.

Finally, the NARUC asserts that assuming attempted FCC preemption of pay cable rate regulation, such action must fail since the FCC has

not met the high standards necessary to preempt State control over local facilities.

ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION HAS NO JURISDICTION TO PREEMPT STATE REGULATION OF PAY CABLE RATES

It is well established that if State legislation is not in conflict with or repugnant to the Congressional scheme, the States are not preempted from legislating in those areas. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851); TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nevada, 1968) aff'd. 396 U.S. 556, 24 L. Ed. 2d 746, 90 S. Ct. 749 (1970).

In Head v. New Mexico Board, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963), the Supreme Court, in discussing preemption under the Communications Act of 1934, stated (at 429-430):

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of federal regulation under the Federal Communications Act. "[T]he question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belong to it as to exclude the State, must be answered by a judgment upon the particular case". Statements concerning the 'exclusive jurisdiction of Congress' beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." California v. Zook, 366 U.S. 725, 731, 93 L. Ed. 1005, 1010, 69 S. Ct. 841. Kelly v. Washington, 302 U.S. 1, 10-13, 82 L. Ed. 3, 10, 12, 58 S. Ct. 87. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, (or) evidence of a Congressional design to preempt the field." Florida Avocado Growers v. Paul, 373 U.S. 132, 141, 10 L. Ed. 2d 248, 256, 83 S. Ct. 1210 (Emphasis Supplied.)

It is quite clear that there is no Congressional scheme or design regarding Federal regulation of cable television (CATV). Nowhere in the Communications Act of 1934 (47 U.S.C. § 151 et seq.), nor in the various amendments to that Act, was the FCC granted the authority and power to regulate CATV. Thus, any argument asserting FCC preemption based on alleged conflict between State and Federal regulatory schemes must fail if predicated upon Congressional mandate. Further, it is clear that any attempted preemption of pay cable rate regulation based upon the alleged national uniformity of pay cable must also fail since the regulation of pay cable rates is of purely local concern and has no national effect. Therefore, the only basis for FCC preemption of pay cable rate regulation must be predicated upon the ability of the FCC to meet the various judicial tests establishing the authority the Federal government has over CATV.

As recognized by Judge Port in his decision, in order for the FCC to have any authority over a particular aspect of CATV, the FCC must establish that the aspect to be regulated must have a reasonably ancillary relationship to the FCC's authority over television broadcasting. This test was established by the Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968), wherein the Court stated:

...the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with Law," as "public convenience, interest, or necessity requires." 47 U.S.C. § 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes. (Id. 392 U.S. at 178, 20 L. Ed. 2d at 1016. Emphasis Supplied.)

Under this standard the Court upheld a negative order of the FCC which restricted a cable television operator in the importation of certain distant television signals. Id. 392 U.S. at 181, 20 L. Ed. 2d at 1018. Not only did the Court delineate the above standard, but it specifically stated that this limited grant of jurisdiction to the FCC was with regard to a cable system's television rebroadcast service only. No authority was extended for FCC control over pay cable.

Several other cases, subsequent to Southwestern Cable, have elaborated upon the "ancillary to the regulation of broadcasting" test. It is the NARUC's contention that Judge Port incorrectly applied the Southwestern Cable standard and thus, the lower court's conclusion that FCC regulation of pay cable rates is ancillary to the regulation of broadcasting is erroneous.

The first case, subsequent to Southwestern Cable, applying the standard laid down by the Supreme Court, was United States v. Midwest Video Corp., 406 U.S. 649, 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972). In Midwest Video, a sharply divided Court upheld an FCC requirement that cable system operators must not only engage in television re-broadcasting, but must also originate programs of their own. Chief Justice Burger, in concurring with the plurality stated:

Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decision of the Commission and the Courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development so that the basic policies are considered by Congress and not left entirely to the Commission and the Courts. (Id. 406 U.S. at 676, 32 L. Ed. 2d at 407)^{2/}

^{2/} The context makes clear that the "open-ended and pervasive jurisdiction" to which Chief Justice Burger refers is the FCC's jurisdiction over broadcasting, not its jurisdiction over cable television.

Both the Southwestern Cable case, and Midwest Video, make it clear that the FCC must establish a reasonable relationship between its regulation of television broadcasting and its attempted regulation of cable television in order to sustain its jurisdiction to regulate any particular aspect thereof. Moreover, it is equally clear that the relationship must in fact be reasonable. The NARUC submits that the lower court did not and could not find this requisite reasonable relationship since it is quite clear that the rates paid by citizens of any one State for pay cable services are not in any way related to the FCC's jurisdiction over television broadcasting and the retransmission of television broadcasts.

Yet, in spite of the local nature of pay cable rates, and in total disregard of the reasonable relationship test, the lower court ruled that the FCC has preemptive authority over rate regulation for pay cable. To reach this conclusion, the court, through the use of tortuous reasoning, relied mainly upon U.S. v. Midwest Video, supra, and a misapplication of two other cable TV cases.

At page 13 of the Slip Opinion (Brookhaven Cable TV, et al. v. Kelly, et al., Slip Op. (March 9, 1977) [J. A. 150]) the court delineated the basis for its decision. The court decided that since pay cable television increases programming diversity, an area in which the Supreme Court has allowed FCC regulation [Midwest Video], it must follow that any FCC action which might perhaps also increase programming diversity must be permitted. The court expressed its belief that any FCC efforts to "nurture and protect this infant medium" [i.e. pay cable] will increase program variety. It concluded that Federal preemption of pay cable rate regulation will "nurture and protect" pay cable, enabling it to grow, and, therefore, such preemption must

increase programming diversity and thus must be valid.

The NARUC contends that such reasoning has no basis in fact. There has been no evidence presented in this case that State regulation of pay cable rates will decrease program variety. There has also been no evidence presented to show that Federal preemption of pay cable rate regulation will increase programming diversity. Yet, without the required evidence, the court reached those conclusions.

In supporting its argument, the lower court relies upon two other cable television cases. Such reliance is patently erroneous especially in light of the fact that the court misconstrued both cases.

The first case, National Association of Theatre Owners v. FCC, 420 F. 2d 194 (D. C. Cir., 1969), cert. denied, 397 U.S. 922 (1970) (NATO), according to the lower court herein, "upheld the FCC's jurisdiction over rate regulation for STV [subscription television]." Brookhaven Slip Op. at 13 [J. A. 150]. Careful examination of NATO reveals that this interpretation is in error and that NATO lends more support to the NARUC's position in the case at bar.

In NATO certain plaintiffs sought to invalidate the FCC's licensing powers over STV. Their goal in this attack appears to be to preclude STV from entering the broadcasting market in competition with other established media. The only reference to rate regulation in NATO stems from the plaintiff's unique argument that lack of specific Congressional authority to regulate rates in the "broadcasting" industry should be taken as "persuasive evidence of Congress' intent to preclude establishment of direct-charge broadcast operations such as STV..." Id. at 198. While the lower court in Brookhaven argues that FCC rate jurisdiction over STV was upheld in NATO, the NATO

court specifically refused to answer this question:

However, we need not reach the difficult question of whether Commission power to establish rates for broadcasting services is implicit in some provisions of title III, since we are unable to agree with petitioner's interpretation of the role which rate-making authority plays in the Communications Act.

Id. at 202

The NATO Court then discussed the reasons for which Congress had provided rate regulation jurisdiction over "communications" but not over "broadcasting". Essentially, these reasons concerned the monopoly or quasi-monopoly characteristics inherent in the communications industry--characteristics which were not inherent in broadcasting. If the FCC were to assert rate regulation powers over STV, the Court continued, "the need for such control would presumably be rooted in developments in the market which demonstrated that STV had been granted a monopolistic or 'quasi-monopolistic' position..."

Id. at 203.

The NARUC finds this dicta from NATO to be quite interesting when applied to the instant case. Specifically, it would appear that FCC jurisdiction, if any, over subscriber rates for cable TV must be "rooted" in concrete evidence of nationwide monopolistic powers in the industry. In fact, most existing Federal rate regulation appears to be founded upon this principle whether that regulation relates to railroads, airlines, or public utilities. Yet, what basis does the U. S. District Court in Brookhaven assert for Federal jurisdiction over rate charged to pay cable TV viewers? It does not base such alleged jurisdiction on a finding that monopoly powers exist in the market, but only on a vague and speculative belief that the State's regulation of such matters may "be expected to chill development" in

the cable TV industry. (Brookhaven Slip Op. at 13). Thus the lower court's reliance upon NATO as a case wherein FCC jurisdiction over rate regulation was upheld, is clearly erroneous and is not supportive of the court's reasoning.

The second case misconstrued by the district court, American Civil Liberties Union v. FCC, 523 F. 2d 1344 (9th Cir., 1975), (ACLU), held, according to the lower court, that the FCC has the jurisdiction "to regulate the rates for cable TV access channels including those for leased access channels." (Brookhaven Slip Op. at 13).

In the ACLU case, the ACLU petitioned for review of certain aspects of the FCC's cable TV rules and regulations set forth in 36 F.C.C. 2d 141 (1972). The two aspects challenged were 1) the failure of the FCC to impose common carrier obligations on cable TV access channels and 2) its failure to limit cablecasting by the cable owner to one channel. The ACLU case did not involve a challenge to general FCC jurisdiction over cable TV nor did it "affirm", as Judge Port states, FCC jurisdiction over rates charged for leased access channels. Rather, in that case, the ACLU was seeking a court finding that the FCC should exercise far more stringent regulation than it had exercised over cable TV, including regulation of rates charged to persons seeking to utilize certain "access" channels made available to them by the regulations. The authority of the FCC to regulate rates was never attacked in ACLU and the entire subject of rate regulation was only broached due to the absence of a program of FCC rate regulation covering "access" channels. Since the question of whether the FCC had rate regulation authority was never raised, to imply that ACLU upheld this power is to import to that case a meaning

far beyond the intent of the Court.^{3/} Further, while the NARUC will not concede that the FCC has the power to regulate "access" channel rates, it should be noted that a vast difference exists between rates charged to users of access channels and rates charged to the viewing public. Assuming, arguendo, that access channel rate regulation could be found to be reasonably "ancillary" to the FCC's general authority over broadcasting (under the monopoly theory announced in NATO), there is no logical bridge between such a finding and a finding that regulation of pay cable rates charged to viewing consumers is a valid exercise of FCC power.

Besides misapplying these two cases, it is the NARUC's contention that the lower court in Brookhaven incorrectly dismissed as not relevant a major holding in this area, the ruling in National Association of Regulatory Utility Commissioners v. FCC, 533 F. 2d 601 (D. C. Cir., 1976) (NARUC). In that case, the Court of Appeals for the D. C. Circuit limited the FCC's reasonably ancillary powers, stating, at 612:

We are not persuaded that either the statute on its face or the construction which it has been given in Southwestern and Midwest supports the Commission's argument that it has a blanket jurisdiction over all activities which cable systems may carry on. The language of § 152(a) is quite general and is not unambiguously jurisdictional in character. (footnote omitted). There is nothing in the words themselves compelling

^{3/} See also National Association of Regulatory Utility Commissioners v. FCC, 533 F. 2d 601, 619-620, esp. fn. 112 at 620 (D. C. Cir. 1976), wherein J. Wilkey, in analyzing the impact of ACLU stated:

However, the opinion states its affirmance only of 'the rules above described,' 523 F. 2d 1351, and the description of the rules at the outset of the discussion of the merits, id., at 1348-49, contains no reference to that section. This, coupled with the court's failure to discuss preemption at any time, leads us to conclude that there was no intention that the holding extend to that issue. (Emphasis supplied).

a conclusion that any or all operations of a cable system are within the ambit of Commission power. ...The Court [in Southwestern and Midwest] thus was not recognizing any sweeping authority over the entity as a whole, but was commanding that each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting. (Emphasis Supplied.)

Thus, the court in NARUC held that an order of the FCC which preempted State regulation over use of CATV system leased access channels for two-way, point-to-point non-video communications was not within the discretion accorded the FCC.

The district court has attempted to distinguish NARUC on factual grounds stating, without any supporting evidence:

Although NARUC did limit the FCC's powers, that limit was placed well beyond the FCC's present attempts to regulate pay cable TV.

The nexus between broadcasting purposes and 'leased access channels for two-way, point-to-point, non-video communications which was found to be so patently missing in NARUC is obviously present in pay cable TV.

Brookhaven Slip Op. at 12-13 [J. A. 150]

Doubtless, Judge Port is correct in his assessment that NARUC did not directly concern pay cable regulation. However, the language of the Court of Appeals in NARUC, when discussing Southwestern Cable and Midwest Video, is too directly on-point to be so lightly dismissed.

Further, the NARUC submits that the recent holding in Home Box Office, Inc. v. FCC, et al., No. 75-1280, et al. (U. S. Court of Appeals, D. C. Cir., March 25, 1977), cert. denied, No. 76-1841 (October 3, 1977) is dispositive of the issues involved in the instant proceeding. In that case the Court of Appeals was not speaking

directly to pay cable rates, but it was ruling on pay cable. More specifically, the court was deciding the validity of FCC regulations on program formats of pay cable television-47 C.F.R. § 76.225 (1975). In discussing these rules, the court explained that:

[t]he effect of these rules is to restrict sharply the ability of cablecasters to present feature film and sports programs if a separate program or channel charge is made for this material. In addition, the rules prohibit cablecasters from devoting more than 90 percent of their cablecast hours to movie and sports programs and further bar cablecasters from showing commercial advertising on cable channels on which programs are presented for a direct charge to the viewer.

Home Box Office, Inc. v. FCC, et al., supra, Slip Op., at 15.

The court in the HBO case, after a discussion of the nature of cable television and the FCC rules, proceeded to an analysis of the Southwestern and Midwest Video cases. (Id. at 29-34). The court stated that the Supreme Court opinion in the Southwestern and Midwest Video cases "look[s] in two directions". Id. at 33. First, the court said the cases recognized an expansive jurisdiction for the FCC to "cope with the technological developments in a rapidly changing field". Id. Then the court continued:

But the opinions are also narrow. Even the broadest opinion, that of the plurality in Midwest Video Corp., recognizes that the Commission can act only for ends for which it could also regulate broadcast television. Finally, the opinions in both cases go no farther than to allow the Commission to regulate to achieve 'long-established' goals or to protect its 'ultimate purposes.' That these cases establish an outer boundary to the Commission's authority we have no doubt, cf. National Ass'n of Regulatory Utility Comm'rs. v. FCC, supra; STAFF OF SUBCOMM. ON COMMUNICATIONS, COMM. ON INTERSTATE AND FOREIGN COMMERCE, CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE 80-83 (1976) (Subcomm. Print), and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television, cf. Greater Boston Television Corp. v. FCC, 143 U.S. App. D. C. 383, 394, 444 F. 2d 841, 852 (1970), cert. denied, 403 U.S. 923 (1971).
Id. at 33-34.

In the instant proceeding, the test enumerated in the above quoted paragraph cannot be met. No evidence has been presented to establish that the rates charged for pay cable have anything at all to do with broadcast television. In addition, no party has shown that Federal preemption of pay cable rate regulation is authorized by the Communications Act (47 U.S.C. § 151, et seq.) nor can it possibly do so.

Further, at 48 of the HBO slip opinion, the U. S. Court of Appeals stated:

[W]e do require that at a minimum the Commission, in developing its cable television regulations, demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media. Further, we require that the Commission state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists.

Certainly, by no stretch of the imagination, can Federal preemption of rates for pay cable television be objectives for which the FCC could legitimately regulate broadcast television, especially since there is no rate question involved in the area of television broadcasting.

In the HBO case the Court concluded that "because the Commission has exceeded its authority over cable television in promulgating the pay cable rules and because there's no evidence to support the need for regulation of pay cable television, these rules must be vacated." Id. at ii. This holding, in effect, states that the FCC has not met the "ancillary to the regulation of broadcasting" test; that the "anti-siphoning" rules and the rules regarding program format are not related to the regulation of ordinary television. The holding also states, in effect, that there was no evidence presented by the FCC to uphold a need for Federal regulation; that the FCC

could not show that "siphoning" actually took place, and could not establish that non-regulation by the FCC would lead to lack of program diversity.

Program diversity is the basis for the decision in Brookhaven. As stated above, Judge Port found that the goal of increased program variety was a valid one for the Commission to pursue and that Federal regulation of pay cable rates would lead to program diversity and thus must be valid. However, the decision in the HBO case completely destroys the circular reasoning used in Brookhaven. If the Federal regulation of program format exceeds the "outer limits of even the open-ended and pervasive jurisdiction" of the Commission (United States v. Midwest Video Corp., 406 U.S. at 676, 32 L. Ed. 2d at 407], then it is hard to see how the Federal preemption of rates charged for pay cable can be within those "outer limits". In addition, if the rationale of increased program diversity is not sufficient to uphold Federal regulation of program format, then certainly, that same rationale is not sufficient to validate Federal preemption of pay cable rates. Finally, if the Federal regulation of siphoning, anti-advertising, and other concepts incorporated into 47 C.F.R. § 76.225 is not "ancillary to the regulation of broadcasting", it is very difficult to see how Federal preemption of rates for pay cable is within that standard.

II

EVEN ASSUMING ARGUENDO, THAT THE FEDERAL COMMUNICATIONS COMMISSION HAS THE JURISDICTION TO PREEMPT STATE REGULATION OF PAY CABLE, IT HAS NOT DONE SO WITH REGARD TO RATES CHARGED FOR PAY CABLE

As already stated in this brief, it is well established that if State legislation is not in conflict with or repugnant to the Congressional scheme, the States are not preempted from legislating in those

areas. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851); TV Pix, Inc. v. Taylor, 304 F. Supp. 459, (D. Nev., 1968) aff'd. 396 U.S. 556, 24 L. Ed. 2d 746. 90 S. Ct. 749 (1970); Head v. New Mexico Board, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963)

The lower court accepts, without supporting evidence, the appellees' assertions that conflict does exist and thus that the States are preempted in regulating pay cable rates. At 14, Brookhaven Slip Op., Judge Port states:

In this case, the preemption or, as stated by the defendant's clarification, the purported preemption of the field, is virtually conceded.

Therefore, by casually accepting the alleged fact that the FCC has actually preempted the area in question, the district court has demonstrated its unwillingness to make a complete examination of the issues involved herein.

It is the NARUC's contention that in the area of rate regulation of pay cable there is no conflict between State and Federal regulatory schemes. The FCC's alleged preemption is clearly erroneous and in direct conflict with the holding of the 8th Circuit Court of Appeals in Springfield Television, Inc. v. City of Springfield, 428 F. 2d 1375, 1379, 1380 (1970) where the court said:

Although...appellants aver that the entire field of CATV regulation has been preempted by Congress and the FCC, they retreated from this position, both in their briefs and at oral argument in this court. That retreat conforms to the present state of the law as indicated by the Supreme Court's recent per curiam affirmance of a 3-judge district court decision involving the Nevada Community Antenna Television System Law. TV Pix, Inc. v. Taylor, 396 U.S. 556, 90 S. Ct. 749, 24 L. Ed. 2d 746 (1970), aff'g. 304 F. Supp. 459 (D. Nev. 1968). The district court in TV Pix, Inc. held that where the FCC promulgates specific regulations of CATV systems, it has to that extent fully occupied the field, but where the FCC is silent, there is no compelling national interest in uniformity which would prohibit state and local regulation, even as to matters held to be within the power of the FCC to regulate by the Supreme Court's landmark

holding of *United States v. Southwestern Cable Co.*, 392 U.S. 392 U.S. 157, 88 S. Ct. 1994, 20 L. Ed. 2d 1001 (1968).

The circuit court in the Springfield Television case required "specific" regulations in order to preempt the field in question, not mere "silence." Here, in the area of pay cable rate regulation, there are no specific regulations. Nowhere in the Communications Act of 1934 (47 U.S.C., § 151 et seq.) and nowhere in the rules promulgated thereunder (Title 47 CFR) do we have any regulations whatsoever regarding Federal control of pay cable rates. At no place in 47 CFR § 76 et seq. does there appear the statement that the FCC has preempted the States in this area.

In spite of all this, however, the lower court in Brookhaven asserts that through Inquiries and Notices of Proposed Rulemaking and through FCC Reports and Orders, the FCC has preempted the area in question. The NARUC submits that the abundance of material churned out by the FCC merely evidence vague policy formulations on pay cable rate regulation.

In the leading case of Pacific Gas and Electric Co. v. FPC, 506 F. 2d 33 (D. C. Cir., 1974), the court pointed out the important distinction between statements of policy by a Federal agency, and rules and regulations of that same agency. The court said (Id. at 38):

...A properly adopted substantive rule establishes a standard of conduct which has the force of law...

A general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.

In this context, it is important to note that at the end of all FCC reports, orders, inquiries, and notices, the FCC states its

conclusions and results of the particular proceeding. However, at the end of the FCC proceedings cited by appellees in their briefs to the U. S. District Court, and at the end of the FCC proceedings cited by Judge Port, no conclusions or orders appear wherein the FCC definitively has ruled that it has preempted pay cable rate regulation. The conclusion inescapably remains that the FCC has not promulgated any specific rules or regulations preempting the area in question and thus has not effectively preempted rate regulation.

Moreover, the NARUC submits that any alleged preemption by the FCC in the regulation of pay cable rates is invalid because such attempted preemption can not meet the tests delineated in Home Box Office v. FCC, supra. Those tests, although quoted previously in this brief, are of such importance that they require reiteration. The court in HBO stated that when the FCC develops regulations on cable television, it must "state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists." (HBO v. FCC, supra., Slip Op. at 48)

Neither the FCC nor the lower court herein has met these tests. Again and again both describe the need for FCC regulation in terms of how State regulation "would in all likelihood" chill development of pay cable. (Brookhaven Slip Op. at 6, quoting from 46 FCC 2d 175, 199-200 [1974], and at 13). This type of language ("in all likelihood") is precisely the lax type of reasoning reached by the HBO decision.

An analysis of all FCC pronouncements in this area will reveal that the FCC has continually based its alleged preemption of pay cable rate regulation not on fact, not on evidence, not on reasons, but merely on conjecture and supposition. The standard established in

HBO is clear in this regard: the FCC must have valid reasons for promulgating specific rules and regulations; there must be a need for regulation.

In conjunction with this requirement that the FCC must establish a need for regulations prior to regulating, another aspect of the HBO decision is of great importance in this proceeding. In its discussion of the evidence presented by the FCC to back up its need for regulating, the HBO court stated:

With the exception of the Commission's ruling in In re Home Box Office, Inc., 51 FCC 2d 317 (1975), JA 141, each of the orders challenged here is the product of rulemaking under Section 303 of the Communications Act, 47 U.S.C. § 303 (1970). Because the statute does not otherwise indicate, this rulemaking is also informal rulemaking governed by Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1970), see id. § 553(a); Ethly Corp. v. EPA, _____ U. S. App. D. C. _____, _____, 541 F. 2d 1, 33-34 (1976) (en banc), and the appropriate standard of review is that set out in Section 10 of the APA, 5 U.S.C. § 706 (2)(A)-(D) (1970), see Ethly Corp. v. EPA, supra, _____ U. S. App. D. C. at _____, 541 F. 2d at 33-34; National Ass'n of Food Chains, Inc. v. ICC, _____ U. S. App. D. C. _____, 535 F. 2d 1308, 1313-1314 (1976) See generally Pedersen Formal Records and Informal Rulemaking, 85 YALE L.J. 38 (1975); Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 CORNELL L. REV. 375 (1974) Home Box Office, Inc. v. FCC, supra, Slip Op. at 48-49

That these legal principles are applicable to the present case cannot be disputed. Assuming the FCC has preempted the area of pay cable rate regulation, such an action occurred through informal rulemaking, if it occurred at all. No evidentiary hearings were held and thus the test to be applied by this Honorable Court to the purported "regulations" is the "arbitrary, capricious" standard of 5 U.S.C. § 706 (2)(A) ^{4/} and not the "substantial evidence" test prescribed by

^{4/} 5 U.S.C. Sec. 706(2)(A), in pertinent part, reads as follows:
The reviewing court shall--

- (2) hold unlawful and set aside agency action, findings and conclusions found to be--
 - (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

5 U.S.C. § 706(2)(E). See National Nutritional Food Ass'n v. Weinberger, 512 F. 2d 688 (2d Cir., 1975), cert. denied, 423 U.S. 827, 46 L. Ed. 2d 44, 96 S. Ct. 44 (1975); Weinberger v. Alynson, Wescott and Dunning, 412 U.S. 609, 622, 37 L. Ed. 2d 207, 219, 93 S. Ct. 2469, (fn. 19) (1973).

The court of appeals, in HBO, then elaborated upon the correct standards of review of agency action stating that its review must be "searching and careful" Id. at 49, quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 153, 91 S. Ct. 814 (1971), and that the court must ensure that the FCC has "adequately considered all relevant factors, and that it has demonstrated a 'rational connection between the facts found and the choice made', Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)." Id.

The court continued in this vein setting out the three procedural requirements called for by the APA: "notice of the proposed rulemaking, an opportunity for interested persons to comment, and a 'concise general statement of [the] basis and purpose of the rules ultimately adopted. 5 U.S.C. § 553(b)-(c)", Id. at 50. The court then cited numerous cases and concluded that:

From this survey of the case law emerge two dominant principles. First, an agency proposing informal rule making has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible. Second, the 'concise and general' statement that must accompany the rules finally promulgated

must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution... [The record must] enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Id. at 51 [Citations omitted].

The court of appeals found that the FCC did not meet the delineated standards; that the FCC, assuming it had jurisdiction to promulgate the rules in question, did not demonstrate the need for such regulation. Thus, the court stated that the rules must be vacated since "a regulation perfectly reasonable and appropriate in the face of a given problem [is] highly capricious if that problem does not exist." Id. at iii, quoting City of Chicago v. FPC, 458 F. 2d 731, 742 (1971), cert denied, 405 U.S. 1074, 31 L. Ed. 2d 808, 92 S. Ct. 1495 (1972). The court found that the FCC failed to "crystallize" what was in fact harmful about siphoning, and also failed to make an adequate showing that siphoning would actually occur. Id. at 52-53.

It is the NARUC's contention that any action by the FCC purporting to preempt the State regulation of pay cable rates must fall under the aforementioned standards. In all the FCC notices of proposed rulemakings, and other voluminous statements cited by the plaintiff, there does not appear the requisite "concise and general" statement of the basis of purposes for FCC rules in this area. The only statements made by the FCC to explain its purpose for alleged preemption of pay cable rates is its broad explanation that local regulation would stunt the growth of pay cable. However, as in the HBO case, no effort has been made to document this claim. At no point in the proceedings under review has the FCC substantiated the allegation that without Federal preemption of rates charged for pay cable the variety of programming would suffer. The FCC's basis for its purported preemption is a naked assertion with no evidentiary support.

The argument may perhaps be raised that the standards discussed above are not applicable to the present case since no actual regulations

regarding pay cable rates were ever promulgated or printed in the Code of Federal Regulations; that this case can be distinguished from the HBO decision in that in HBO the court was reviewing specific regulations, i.e. 47 C.F.R. 76.225. This argument must fail in light of the fact that, except for the ultimate promulgation of rules, all other procedures in the case under review and HBO were the same. In both cases the FCC followed the informal rulemaking procedure, publishing notices of proposed rulemaking, etc. Thus, the standards delineated in HBO are directly applicable to the instant case, and the NARUC submits that this Court should so apply those tests.

Also in conjunction with the aforementioned standards requiring the FCC to establish need for regulations prior to regulating, an additional proposition arises. That is, that the FCC has attempted preemption in this area not for the purpose of regulating, but for the sole purpose of precluding State involvement. Such an action by a Federal agency, where no conflict between Federal/State regulatory schemes exist, and where no adequate need has been shown, is surely invalid since it completely places valid State regulation at the whim of the Federal government.

The Supreme Court, to be sure, has found legitimate agency preemption even where an agency has not taken specific action, but this has occurred only where the subject matter or field of that agency action was specifically placed by statute within the province of that agency's power.

In Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026 (1946), the question presented was whether the N. Y. Labor Relations Board could permit unionization of Bethlehem's foremen where the National Labor Relations Board had not acted to do so. While this case held that State action was precluded despite Federal inaction, the matter turned on the question of whether the Federal Board had refrained from exercising its full authority under the policy of statute. Where the National Labor Relations Act, 49 Stat. 449, had specifically authorized the Board to determine appropriate collective bargaining units that field was preempted. See also Oregon-Washington Railroad & Navigation Co. v. Washington, 270 U.S. 87, 70 L. Ed. 482, 46 S. Ct. 279 (1926), where the inaction of the Secretary of Agriculture was held not to allow State action since "the obligation to act without respect to the States is put directly on the Secretary..." Id. at 102-3.

In Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958), the Supreme Court invalidated Chicago's licensing of local inter-terminal motor vehicle transportation of railroad passengers despite the fact that the Interstate Commerce Commission [ICC] had not exercised its licensing power over that service. However, this case also turned on specific Congressional direction that the ICC have jurisdiction over the field of "delivering passengers or property to and from connection lines..." Id. at 85.

The NARUC submits that nowhere in the Federal Communications Act, 47 U.S.C. § 151 et seq., can be found specific statutory authority for FCC regulation over the field of pay cable rates. Indeed, it would be a totally novel construction of law and a broad expansion of Federal

agency power to allow the FCC, by administrative fiat and without promulgating its own program pursuant to statutory authority, to undercut the States' programs regulating local pay cable rates.

III.

ASSUMING ARGUENDO, THAT THE FEDERAL
COMMUNICATIONS COMMISSION HAS ACTUALLY ATTEMPTED TO PREEMPT STATE
REGULATION OF RATES FOR PAY CABLE, SUCH
ACTION MUST FAIL SINCE THE FEDERAL COMMUNICATIONS
COMMISSION HAS NOT MET THE HIGH STANDARDS NECESSARY TO
PREEMPT STATE REGULATION OF LOCAL
FACILITIES

That the rates charged to users of pay cable television is of purely local concern, and thus of an intrastate nature, can hardly be disputed. The mere fact that some of the signals involved in a particular cable transmission may extend over State lines does not change the local nature of the rates charged for the services offered.

Historically, before a Federal agency can intervene in the local affairs of State government, certain strict standards first had to be compiled with. In the instant case it is clear that the FCC has not met these rigid guidelines. There has been no showing by the FCC that regulation by State commissions of pay cable rates would be incompatible with, constitute a burden on, or otherwise impede FCC policies regarding the growth of pay cable. Instead, the FCC bases its alleged preemption on the unsupported grounds that State regulation will in all likelihood chill development of pay cable, and thus State regulation must fall.

Such a standard was certainly not contemplated by the Congress in its grant of authority to the FCC, and the courts have never established such ineffectual tests for Federal preemption.

Even the ICC, which enjoys greater latitude in the intervention

into intrastate affairs than the FCC must make its "justification for the exercise of this exceptional federal power to interfere ... definitely and clearly apparent." North Carolina v. U. S., 325 U.S. 507, 511, 89 L. Ed. 1760, 1765, 1766, 65 S. Ct. 1260 (1945); See also Chicago, M., St. P & P R. R. v. Illinois, 355 U.S. 300, 306, 2 L. Ed. 2d 292, 298, 78 S. Ct. 304 (1958); Utah Public Service Commission v. U. S., 356 U.S. 421, 425, 2 L. Ed. 2d 886, 891, 78 S. Ct. 796, 799 (1958); Florida v. U. S., 282 U.S. 194, 211-212, 75 L. Ed. 291, 302-303, 51 S. Ct. 119 (1931). The ICC must make "clear findings, supported by evidence of ... ment essential to the exercise of that power..." and those findings "must meet a 'high standard of certainty.'" North Carolina v. U. S., supra., 325 U.S. at 511, 89 L. Ed. at 1765.

Certainly, it cannot be presumed that the FCC must meet a lesser standard when it attempts to abrogate State regulatory authority. Such standard has not been met in the case at bar.

CONCLUSION

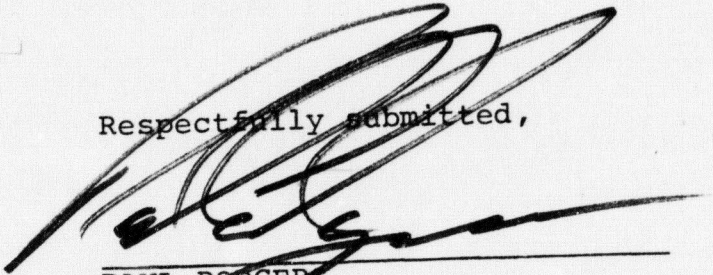
The decision of the U. S. District Court for the Northern District of New York being appealed from herein, represents a drastic departure from well-established principles of law holding that certain rigid requirements must first be satisfied by the FCC prior to its preempting valid State authority over pay cable rate regulation. It is the NARUC's contention that these standards have not been met and therefore, any action by the FCC allegedly preempting rates charged for pay cable is invalid.

Therefore, for the reasons stated, we respectfully submit that the decision of the U. S. District Court for the Northern District of New York be reversed and that this Honorable Court rule that the FCC

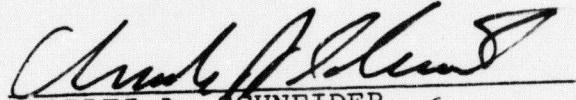
does not have the jurisdiction to preempt State regulation of rates charged for pay cable television.

In the alternative, if this Court finds that the FCC does in fact have the requisite jurisdiction to preempt the area in question, then the NARUC respectfully requests this Court to rule that the FCC has not exercised its jurisdiction and therefore State regulation of pay cable rates is not so preempted.

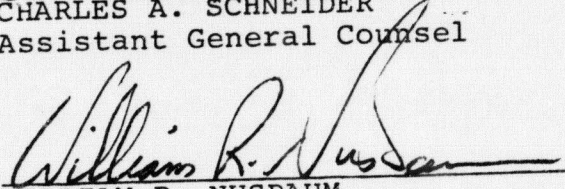
Respectfully submitted,



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October 28, 1977

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Dated at Washington, D. C. this 28th day of October, 1977.

A handwritten signature in dark ink, appearing to read "William R. Nusbaum", is written over a horizontal line.

WILLIAM R. NUSBAUM
Deputy Assistant General Counsel

ADDENDUM

A-1

EXECUTIVE LAW

§ 811

ARTICLE 28—COMMISSION ON CABLE TELEVISION [NEW]

- Sec.
- 811. Declaration of legislative findings and intent.
 - 812. Definitions.
 - 813. Application of article.
 - 814. Commission created.
 - 815. Duties of the commission.
 - 816. Powers of the commission.
 - 817. Costs and expenses of the commission.
 - 818. Municipal fees; taxes or charges.
 - 819. Franchise requirement.
 - 820. Construction of systems.
 - 821. Certificate of confirmation.
 - 822. Transfer, renewal or amendment of franchises and transfer of control over franchises and system properties.
 - 823. Interconnection and system coordination.
 - 824. Requirement for adequate service.
 - 825. Rates.
 - 826. Abandonment of service.
 - 827. Termination of franchises.
 - 827-a. Forfeiture.
 - 828. Landlord-tenant relationship.
 - 829. Censorship prohibited.
 - 830. Liability for obscenity, defamation and invasion of privacy.
 - 831. Invalid provisions.

§ 811.¹ Declaration of legislative findings and intent

Upon investigation of the public interest associated with cable television, the legislature of the state of New York has determined that while cable television serves in part as an extension of interstate broadcasting, operations involve public rights-of-way, municipal franchising, and vital business and community service, and, therefore, are of state concern; that while said operations must be subject to state oversight, they also must be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible; that municipalities and the state would benefit from valuable educational and public services through cable television systems; that the public and the business community would benefit if served by cable channels sufficient to meet the needs of producers and distributors of program and other communication content services; and that the cable television industry is in a period of rapid growth and corporate consolidation and should proceed in accord with regional and state-wide service objectives; and, many municipalities lack the necessary resources and expertise to plan for and secure these benefits and to protect subscribers and other parties to the public interest in franchise negotiations.

There is, therefore, a need for a state agency to develop a state telecommunications policy; to promote the rapid development of the cable television industry responsive to community and public interest and consonant with policies, regulations and statutes of the federal government; to assure that cable television companies provide adequate, economical and efficient service to their subscribers, the municipalities within which they are franchised and other parties to the public interest; and, to encourage the endeavors of public and private institutions, municipalities, associations and organizations in developing programming for the public interest.

It is the intent of the legislature in the enactment of this article to vest authority in an independent commission to oversee development

§ 811

EXECUTIVE LAW

of the cable television industry in New York State in accordance with a statewide service plan; to review the suitability of practices for franchising cable television companies to protect the public interest; to set standards for cable television systems and franchise practices; to assure channel availability for municipal services, educational television, program diversity, local expression and other program and communications content services; to provide consultant services to community organization and municipalities in franchise negotiations; and, to stimulate the development of diverse instructional, educational, community interest and public affairs programming with full access thereto by cable television companies, educational broadcasters and public and private institutions operating closed circuit television systems and instructional television fixed services.

Added L.1972, c. 466, § 1.

¹ Another section 811 is set out in article 27, ante.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

1. Generally

Federal Communications Commission Act of 1934, 47 U.S.C.A. § 151

et seq., was not intended to preempt the field to the exclusion of all state regulations. *Ceracche Television Corp. v. Kelly*, 1974, 80 Misc.2d 956, 364 N.Y.S.2d 276.

States have power to regulate cable television companies. *Id.*

§ 812.¹ Definitions

The words and phrases used in this article shall have the following meanings unless a different meaning clearly appears in the context.

(1) "Cable television company" shall mean any person owning, controlling, operating, managing or leasing a cable television system within the state.

(2) "Cable television system" shall mean any system which operates for hire the service of receiving and amplifying programs broadcast by one or more television or radio stations or any other programs originated by a cable television company or by any other party, and distributing such programs by wire, cable microwave or other means, whether such means are owned or leased, to persons who subscribe to such service. Such definition does not include:

- (a) any system which serves fewer than fifty subscribers; or
- (b) any master antenna television system.

(3) "Commission" shall mean the commission on cable television created by this article.

(4) "Franchise" shall mean and include any authorization granted by a municipality in terms of a franchise, privilege, permit, license or other municipal authorization to construct, operate, maintain, or manage a cable television system in any municipality.

(5) "Gross annual receipts" shall mean any and all compensation received directly or indirectly by a cable television company from its operations within the state, including but not limited to sums received from subscribers or users in payment for programs received and/or transmitted, advertising and carrier service revenue and any other moneys that constitute income in accordance with the system of accounts approved by the commission.

Gross annual receipts shall not include any taxes on services furnished by a cable television company imposed directly on any subscriber or user by any municipality, state, or other governmental unit and collected by the company for such governmental unit.

(6) "Master antenna television system" shall mean any system which serves only the residents of one or more apartment dwellings under common ownership, control or management and any commercial establishment located on the premises of such apartment house and which transmits only signals broadcast over the air by stations which may be

EXECUTIVE LAW

§ 814

normally viewed or heard locally without objectionable interference, and which does not provide any additional service over its facilities.

(7) "Municipality" shall mean any village, town, city or county not wholly contained within a city in the state.

(8) "State" shall mean the state of New York.

(9) "State agency" shall mean any office, department, board, commission, bureau, division, public corporation, agency or instrumentality of the state.

(10) "Person" shall mean any individual, trustee, partnership, association, corporation or other legal entity.

(11) "Program" shall mean any broadcast-type program, signal, message, graphics, data, or communication content service.

Added L.1972, c. 466, § 1; amended L.1976, c. 654, § 1.

¹ Another section 812 is set out in article 27, ante.

1976 Amendment. Subd. 2. L.1976, c. 654, § 1, eff. July 24, 1976, substituted "or" for "and/or" and "any other" for "another".

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 813.¹ Application of article

The provisions of this article shall apply to every cable television system and every cable television company as defined in section eight hundred twelve of this article, operating within the state of New York, including a cable television company which constructs, operates and maintains a cable television system in whole or in part through the facilities of a person franchised to offer common or contract carrier services. Persons possessing franchises for any of the purposes contemplated by this article, shall be deemed to be subject to the provisions of this article although no property may have been acquired, business transacted or franchises exercised.

Added L.1972, c. 466, § 1.

¹ Another section 813 is set out in article 27, ante.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 814.¹ Commission created

1. A state commission on cable television is hereby created within the executive department which shall consist of five members none of whom shall hold any other public office and no more than three of whom shall be of the same political party. The members of the commission shall be representative of the broad range of interests related to telecommunication needs and concerns including so far as possible the fields of broadcasting, education television, cable television, communication technology and consumer interests.

2. Each member shall be appointed by the governor, by and with the advice and consent of the senate, for five years, provided, however, that of the five members first appointed, one shall be appointed for one year, one for two years, one for three years, one for four years and one for five years, from January first next succeeding their appointment. Their successors shall be appointed for terms of five years each. Members shall continue in office until their successors have been appointed and qualified.

3. The governor shall designate one of the members to be chairman who shall be the chief executive officer of the commission. The members shall elect one of their number as vice chairman of the commission.

4. Vacancies in the commission occurring otherwise than by expiration of term shall be filled for the unexpired term in the same manner as original appointments.

§ 814

EXECUTIVE LAW

5. The chairman shall receive compensation fixed by the governor within the amount made available by appropriation therefor. The other members of the commission shall each receive an annual salary of five thousand dollars. Each member of the commission shall be entitled to the expenses actually and necessarily incurred by him in the performance of his official duties. The commission, its members, officers and employees shall be subject to the provisions of sections seventy-three and seventy-four of the public officers law.

6. A majority of the members of the commission then in office shall constitute a quorum for the transaction of any business or the exercise of any power or function of the commission. The commission may delegate to one or more of its members, or its officers, agents or employees, such powers and duties as it may deem appropriate.

7. The commission may appoint a counsel, an executive director and such other officers, employees, agents and consultants as it may deem necessary, prescribe their duties and fix their compensation within the amounts available therefor by appropriation.

Added L.1972, c. 466, § 1; amended L.1975, c. 35, § 1.

¹ Another section 814 is set out in article 27, ante.

1975 Amendment. L.1975, c. 35, § 1, eff. Apr. 1, 1975, provided the members of the commission shall receive \$5000 annually and are to be compensated for actual expenses necessarily incurred, in lieu of provisions which had their compensation fixed by the governor.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 815.¹ Duties of the commission

The commission shall:

(1) develop and maintain a statewide plan for development of cable television services, setting forth the objectives which the commission deems to be of regional and state concern;

(2) to the extent permitted by, and not contrary to applicable federal law, rules and regulations:

(a) prescribe standards for procedures and practices which municipalities shall follow in granting franchises, which standards shall provide for (i) the issuance of a public invitation to compete for the franchise; (ii) the filing of all franchise applications and related documents as public records, with reasonable notice to the public that such records are open to inspection and examination during reasonable business hours; (iii) the holding of a public hearing, upon reasonable notice to the public and the commission, at which the applicants and their proposals shall be examined and members of the public and interested parties are afforded a reasonable opportunity to express their views thereon; (iv) the rendition of a written report by the municipality, made available to the public, setting forth the reasons for its decision in awarding the franchise; and (v) such other procedural standards as the commission may deem necessary or appropriate to assure maximum public participation and competition and to protect the public interest;

(b) prescribe minimum standards for inclusion in franchises, including maximum initial and renewal terms; minimum channel capacity; provisions regarding access to, and facilities to make use of, channels for education and public service programs; a requirement that no such franchise may be exclusive; standards necessary or appropriate to protect the interests of viewers of free broadcast television and the public generally, which prohibit or limit cable television companies from prohibiting or entering into agreements prohibiting the sale or other transfer of rights for the simultaneous or subsequent transmission over free

EXECUTIVE LAW

§ 815

broadcast television of any program originated or transmitted over cable television; and such other standards for inclusion in franchises as the commission shall deem necessary or appropriate to protect the public interest;

(c) prescribe standards by which the franchising authority shall determine whether an applicant possesses (i) the technical ability, (ii) the financial ability, (iii) the good character and (iv) other qualifications necessary to operate a cable television system in the public interest;

(d) prescribe standards for the construction and operation of cable television systems, which standards shall be designed to promote (i) safe, adequate and reliable service to subscribers, (ii) the construction and operation of systems consistent with the most advanced state of the art, (iii) a construction schedule providing for maximum penetration as rapidly as possible within the limitations of economic feasibility, (iv) the construction of systems with the maximum practicable channel capacity, facilities for local program origination, facilities to provide service in areas conforming to various community interests, facilities with the technical capacity for interconnection with other systems within regions as established in the commission's statewide plan and facilities capable of transmitting signals from subscribers to the cable television company or to other points; and (v) the prompt handling of inquiries, complaints and requests for repairs;

(e) prescribe such standards for the prohibition or limitation of concentration of control over mass media and communication companies and facilities and methods of enforcing such standards, as the commission may determine to be necessary or appropriate to protect the public interest; provided, however, that nothing herein contained shall be construed to authorize the impairment of any existing rights of any mass media and communication company or any subsidiary thereof.

(3) provide advice and technical assistance to municipalities and community organizations in matters relating to cable television franchises and services;

(4) establish minimum specifications for equipment, service and safety of cable television systems for use by municipalities;

(5) review and act upon applications for certificates of confirmation in accordance with such standards and as hereinafter provided;

(6) represent the interests of the people of the state before the federal communication commission and make available information on communications developments at the federal level;

(7) stimulate and encourage cooperative arrangements among organizations, institutions and municipalities in the development of regional educational, instructional and public affairs programming services;

(8) cooperate with municipalities to facilitate undertaking of multiple community cable television systems;

(9) encourage the creation of public and community groups, to organize, seek chartering when appropriate, and request franchising for the establishment of public, non-profit and not-for-profit cable television operations;

(10) maintain liaison with the communications industry and parties both public and private, having an interest therein, other states and agencies of this state to promote the rapid and harmonious development of cable television services as set forth in the legislative findings and intent;

(11) undertake such studies as may be necessary to meet the responsibilities and objectives of this article.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, §§ 1, 2.

1 Other sections 815 are set out in articles 27 and 27-A, ante.

1972 Amendment. Subd. 2, par. (a). substituted "competition" for "completion" in clause V.

§ 815**EXECUTIVE LAW**

Subd. 2, par. (b). L.1972, c. 467, § 1, eff. Jan. 1, 1973, inserted provision relating to standards to protect interests of viewers of free television.

Subd. 2, par. (e). L.1972, c. 467, § 2, eff. Jan. 1, 1973, added proviso respecting impairment of rights.

Effective Date. Section 4 of L.1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 816.¹ Powers of the commission

1. The commission may promulgate, issue, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the purposes of this article. Such orders, rules and regulations may classify persons and matters within the jurisdiction of the commission and prescribe different requirements for different classes of persons or matters. A copy of any order, rule or regulation promulgated hereunder shall be subject to public inspection during reasonable business hours.

2. The commission may require cable television companies to maintain and file such reports, contracts and statements, including but not limited to ownership, accounting, auditing and operating statements, engineering reports and other data as the commission may deem necessary or appropriate to administer the provisions of this article. The commission, including members of its staff, may make reasonable inspections of the records and facilities of any cable television company.

3. The commission may examine, under oath, all officers, agents, employees and stockholders of any cable television company, municipal officials and any other persons and compel the production of papers and the attendance of witnesses to obtain the information necessary to administer the provisions of this article.

4. The commission may require and receive from any agency of the state or any political subdivision thereof such assistance and data as may be necessary to enable the commission to administer the provisions of this article. The commission may enter into such cooperative arrangements with the public service commission, the board of regents, the council on the arts, other state agencies and municipalities, each of which is hereby authorized to enter into such cooperative arrangements, as shall be necessary or appropriate to assure that there will be maximum utilization of existing expertise in communications technology, cable television operations and programming and that the purposes of this article will be effectively accomplished. Upon request of the commission, any state agency may transfer to the commission such officers and employees as the commission may deem necessary from time to time to assist the commission in carrying out its functions and duties. Officers and employees so transferred shall not lose their civil service status or rights.

5. The commission shall have and may exercise all other powers necessary or appropriate to carry out the purposes of this article.

Added L.1972, c. 466, § 1.

¹ Another section 816 is set out in article 27, ante.

Effective Date. Section 4 of L.1972, c. 467, § 8, provided that this c. 466; renumbered 5 and amended section is effective Jan. 1, 1973.

§ 817.¹ Costs and expenses of the commission

1. All costs and expenses of the commission shall be paid pursuant to appropriation in the first instance from the state treasury, on the certification of the chairman of the commission and upon the audit and warrant of the comptroller. The state treasury shall be reimbursed therefor by payments to be made thereto from moneys collected pursuant to this article.

2. On or before May first of each year, the commission shall estimate the total costs and expenses necessary to operate and administer the commission for the current state fiscal year, including

EXECUTIVE LAW

§ 817

the repayment of any first instance appropriations outstanding on March thirty-first immediately preceding such fiscal year. The commission shall, at such time or times and pursuant to such procedure as it shall determine by regulation, bill and collect from each cable television company the greater of (i) one hundred dollars or (ii) an amount computed by multiplying such total estimated operating expenses of the commission by a fraction the numerator of which is the gross annual receipts of such cable television company during such twelve month period preceding the date of computation as the commission shall designate by regulation, and the denominator of which is the total gross annual receipts of all cable television companies operating in the state during such period. A cable television company may elect to make partial payments equal to one quarter of the total amount billed June thirtieth, September thirtieth, December thirty-first and March tenth of the fiscal year to which the billing relates. On or before September fifteenth of each year, the commission shall compute the actual costs and expenses of the commission for the preceding state fiscal year and shall, on or before October fifteenth of such year, send to each cable television company a statement setting forth the amount due and payable by, or the amount standing to the credit of, such cable television company computed on the basis of the above stated formula, except that for the purposes of such computation the fraction shall be multiplied against the total actual operating expenses of the commission for such fiscal year. Any amount owing by any cable television company shall be payable not later than thirty days following the date of such statement. Any amount standing to the credit of any cable television company shall be applied as a credit against any succeeding payment due. In no event shall the amount billed to or collected from any cable television company pursuant to this section exceed two percent of the gross annual receipts of such company during the twelve month period designated by the commission.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, § 3; L.1974, c. 528, § 1; L.1975, c. 586, § 1.

¹ Another section 817 is set out in article 27, ante.

1975 Amendment. Subd. 2. L. 1975, c. 586, § 1, substituted "two percent" for "one percent."

1974 Amendment. Subd. 2. L.1974, c. 528, § 1, eff. Nov. 30, 1974, substituted "On or before May first" for "On or before December first". "the current state fiscal year" for "the next ensuing state fiscal year". and "elect to make partial payments equal to one quarter of the total amount billed on June thirtieth, September thirtieth, December thirty-first and March tenth of the fiscal year to which the billing relates" for "elect to make partial payments for such costs and expenses on March thirty-first, June thirtieth, September thirtieth and, December thirty-first of each year."

1972 Amendment. Subd. 2. L.1972, c. 467, § 3, eff. Jan. 1, 1973, omitted estimate of compensation for personal services, provided for estimate to include repayment of any first instance appropriations, and inserted provisions relating to computation of expenses on or before September 15 of each year and procedure pertaining thereto, payment of amounts due and

crediting of payments not applied to future payments due.

Effective Date of 1975 Amendment; Applicability. L.1975, c. 586, § 2, provided: "This act [amending this section] shall take effect immediately [Aug. 1, 1975] and, notwithstanding any action taken by the commission on cable television prior to the effective date hereof, shall be applicable to reimbursement of commission costs and expenses, including the repayment of any first instance appropriations outstanding, for the fiscal year commencing April first, nineteen hundred seventy-five and for each succeeding fiscal year."

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective May 24, 1972.

Bills Transmitted Prior to Nov. 30, 1974. L.1974, c. 528, § 2, provided in part that any bills transmitted pursuant to this section prior to Nov. 30, 1974, shall be governed by and collected in accordance with the terms of this section prior to the amendment thereof by L.1974, c. 528.

§ 817

EXECUTIVE LAW

Estimate and Billing of Expenses for 1973-1974.

Section 4 of L.1972, c. 466; added L.1972, c. 467, § 9, eff. Jan. 1, 1973, provided: "Notwithstanding the provisions of subdivision two of section eight hundred seventeen of the executive law, as added by section one of this act, pertaining to the date on which the estimate of the commission's costs and expenses shall be made, the state commission on cable television may estimate its costs and expenses for the period from January first, nineteen hundred seventy-three to and including March thirty-first, nineteen hundred seventy-four, or any portion thereof, and may bill any cable television company for such costs and expenses at such time or times as it deems appropriate."

Index to Notes

Allocation of expenses 2
Assessments 4
Constitutionality 1
Federal regulations 3

1. Constitutionality

This section which provides that expenses of cable television commission shall be allocated among cable television companies in proportion to their gross receipts from operations within state does not violate commerce clause of Federal Constitution, U.S.C.A.Const. art. 1, § 8, cl. 3. *Ceracche Television Corp. v. Kelly*, 1974, 80 Misc.2d 956, 364 N.Y.S.2d 276.

This section which provides that expenses of cable television commission shall be allocated among cable television companies in proportion to their gross receipts from operations within state but that no company shall be assessed more than one percent of its gross receipts for any 12-month period does not violate supremacy clause of Federal Constitution, U.S.C.A.Const art. 6, cl. 2, on theory that this section directly violates a Federal Communications Commission rule. *Id.*

2. Allocation of expenses

Cable television commission's order, which explains basis for estimate of costs and expenses and basis for conclusion that every cable television company should be assessed one percent of its annual gross receipts, was a reasonable and lawful implementation of this section which provides

that expenses of such commission shall be allocated among cable television companies in proportion to their gross receipts from operations within state but that no company shall be assessed more than one percent of its gross receipts for any 12-month period. *Ceracche Television Corp. v. Kelly*, 1974, 80 Misc.2d 956, 364 N.Y.S.2d 276.

3. Federal regulations

Federal Communications Commission regulation providing that franchise fee imposed on cable television shall be 3-5% of gross subscriber revenues did not preempt fee imposed by state on gross annual receipts of cable television company where federal regulation provided that such regulation shall not be effective with respect to cable television systems in operation prior to March 31, 1972 until the end of current franchise period, or March 31, 1977, whichever comes first, and where cable television company contesting assessment had been in operation since at least 1960 and its current franchises did not expire prior to March 31, 1977. *Ceracche Television Corp. v. Kelly*, 1975, 50 A.D.2d 134, 376 N.Y.S.2d 217.

4. Assessments

While cable television industry has been held to be engaged in interstate communication, in case where assessment on gross annual receipts to finance expenses of commission on cable television applied only to income derived from cable television company's operations within the state and where cable television company's activities occurred entirely within the borders of the state, assessment did not discriminate in any way against interstate commerce nor was there any substantial danger of cumulative or multiple state taxation. *Ceracche Television Corp. v. Kelly*, 1975, 50 A.D.2d 134, 376 N.Y.S.2d 217.

Cable television company was in no way prejudiced by late estimate of expenses and thus late estimate was valid for purposes of assessment on the company to finance expenses of commission on cable television. *Id.*

Revenue derived from cable television company's auxiliary services, such as pay cable, leased access services and local origination programming were revenues derived from within the state, for purposes of assessment on gross annual receipts to finance expenses of commission on cable television. *Id.*

EXECUTIVE LAW

§ 821

§ 818.¹ Municipal fees; taxes or charges

Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulations.

Added L.1972, c. 466, § 1.

¹ Another section 818 is set out in article 27, ante.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 819.¹ Franchise requirement

1. Notwithstanding any other law, no cable television system, whether or not it is deemed to occupy or use a public thoroughfare, may commence operations or expand the area it serves after April first, nineteen hundred seventy-three unless it has been franchised by each municipality in which it proposes to provide or extend service.

2. A municipality shall have the power to require a franchise of any cable television system providing service within the municipality, notwithstanding that said cable television system does not occupy, use or in any way traverse a public street. The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises.

3. Nothing in this article shall be construed to prevent franchise requirements in excess of those prescribed by the commission, unless such requirement is inconsistent with this article or any regulation, policy or procedure of the commission.

Added L.1972, c. 466, § 1.

¹ Another section 819 is set out in article 27, ante.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 820. Construction of systems

Every cable television system constructed after April first, nineteen hundred seventy-three, shall comply with such construction standards as the commission may prescribe pursuant to subdivision two of section eight hundred fifteen.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 821. Certificate of confirmation

1. Except as provided in subdivision six of this section, after April first, nineteen hundred seventy-three, no person shall exercise a franchise, and no such franchise shall be effective, until the commission has confirmed such franchise. A person wishing to exercise a franchise shall file with the commission an application for a certificate of confirmation in such form and containing such information and supportive documentation as the commission may require. The application shall be accompanied by proof of service thereof upon the franchisor and by such fee as the commission may set.

2. The commission may hold a public hearing on any application for a certificate of confirmation if it determines that such a hearing is in the public interest. The commission shall fix the time and place for such a hearing and cause notice thereof to be given to the applicant,

§ 821

EXECUTIVE LAW

the chief executive officer of the municipality issuing the franchise and such other persons as the commission may deem appropriate. Testimony may be taken and evidence received at such a hearing pursuant to such rules and procedures as the commission may establish.

3. The commission shall issue a certificate of confirmation of the franchise unless it finds that (a) the applicant, (b) the proposed cable television system, or (c) the proposed franchise does not conform to the standards embodied in the regulations promulgated by the commission pursuant to subdivision two of section eight hundred fifteen, or that operation of the proposed cable television system by the applicant under the proposed franchise would be in violation of law, any regulation or standard promulgated by the commission or the public interest.

4. The commission may issue a certificate of confirmation contingent upon compliance with standards, terms or conditions set by the commission which it determines would not have been met by the applicant, system or franchise as proposed.

5. In the event the commission refuses to issue a certificate of confirmation, it shall set forth in writing the reasons for its decision.

6. Any cable television company which, pursuant to an existing franchise, (i) was lawfully engaged in actual operations, or (ii) had commenced substantial construction (as such term is defined by the commission) of a cable television system on January first, nineteen hundred seventy-two may continue to exercise said franchise pursuant to the terms thereof, provided such company files with the commission, on or before July first, nineteen hundred seventy-three an application in such form and containing such information and supporting documentation as the commission may require. The commission shall issue a certificate of confirmation to such a cable television company valid for five years without further proceedings, which certificate may be renewed by the commission on application for five year terms pursuant to the provisions of section eight hundred twenty-two.

7. Notwithstanding any other provision of this article, any franchise which has been granted but not exercised as indicated by substantial performance within one year of January first, nineteen hundred seventy-three shall be deemed contrary to the public interest and intent of such franchise and any certificate of confirmation previously issued by the commission shall be invalidated, unless the cable television company can make an adequate showing that substantial performance was precluded by circumstances beyond the reasonable control of such company. Any subsequent application for a certificate of confirmation shall be determined in accordance with the provisions of this section.

8. The commission shall issue a certificate of confirmation, valid for a five year period, to any cable television company engaged in actual and lawful nonfranchised cable television operations on April first, nineteen hundred seventy-three, if application for such a certificate is made to the commission on or before September first, nineteen hundred seventy-four. Notwithstanding any other provisions of this article, any such company which files such an application may continue to operate within the limits of the area in which it was actually rendering service on April first, nineteen hundred seventy-three, as determined by the commission. Such a certificate of confirmation may be renewed by the commission on application for five year terms pursuant to the provisions of section eight hundred twenty-two. Any such company which fails to file an application pursuant to this section on or before September first, nineteen hundred seventy-four, shall thereafter be prohibited from continuing operation of a nonfranchised cable television system; provided, however, that the commission may authorize such continued nonfranchised operation in extraordinary circumstances for such periods as the commission may deem appropriate.

9. Nothing in this section shall be deemed to validate a franchise not granted in accordance with law or affect any claims in litigation

EXECUTIVE LAW

§ 822

on the effective date of this article. No confirmation under this section shall preclude invalidation of any franchise illegally obtained.

Added L.1972, c. 466, § 1; amended L.1974, c. 88, § 1.

1974 Amendment. Subd. 8. L.1974, c. 88, § 1, eff. Mar. 19, 1974, substituted references to April 1, 1973 for January 1, 1972; Sept. 1, 1974 for July 1, 1973; 1973 for 1972, preceding "as determined by the commission"; and prohibited any company which fails to file an application on

or before Sept. 1, 1974, to continue operation of a nonfranchised cable television system.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 822. Transfer, renewal or amendment of franchises and transfer of control over franchises and system properties

1. No transfer, renewal or amendment of any franchise, or any transfer of control of a franchise or certificate of confirmation or of facilities constituting a significant part of any cable television system shall be effective without the prior approval of the commission. Such approval shall be required in addition to any municipal approval required under the franchise or by law. For the purposes of this section, a merger or consolidation of two or more cable television companies shall be deemed to be a transfer of the franchises or certificates granted to such companies.

2. A person wishing to transfer, renew or amend a franchise, or to transfer control of a franchise or of a substantial part of the facilities thereof shall file with the commission an application for approval of such change, in such form and containing such information and supporting documents as the commission may require. The application shall be accompanied by proof of service thereof upon the franchisor, if any, and by such fee as the commission may set. The commission may hold a public hearing on any such application as set forth in subdivision two of section eight hundred twenty-one.

3. The commission shall approve the application unless it finds that the applicant, the proposed transferee or the cable television system does not conform to the standards embodied in the regulations promulgated by the commission pursuant to section eight hundred fifteen or that approval would be in violation of law, any regulation or standard promulgated by the commission or the public interest: provided, however, that a failure to conform to the standards embodied in the regulations promulgated by the commission shall not preclude approval of any such application if the commission finds that such approval would serve the public interest.

4. The commission may approve the application contingent upon compliance with standards, terms or conditions set by the commission which it determines would not have been met by the proposed transfer, renewal or amendment.

5. In the event the commission refuses to approve the application, it shall set forth in writing the reasons for its decision.

6. Approval of a transfer, renewal or amendment under this section shall not preclude invalidation of a franchise illegally obtained.

Added L.1972, c. 466, § 1; amended L.1974, c. 87, § 1.

1974 Amendment. Subd. 2. L.1974, c. 87, § 1, eff. Mar. 19, 1974, corrected text by substituting "franchisor" for "franchise or."

Subd. 3. L.1974, c. 87, § 1, eff. Mar. 19, 1974, added proviso that a failure to conform to the standards in the regulations shall not preclude

approval if the commission finds such approval serves the public interest.

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 823

EXECUTIVE LAW

§ 823. Interconnection and system coordination

Whenever the commission finds it to be in the public interest, the commission may, either upon application of an interested party or on its own initiative, and after public notice and opportunity for hearing, order the interconnection of cable television systems and facilities or the coordinated operation of such systems and facilities. The commission may append to such order such reasonable terms and conditions as will best promote the public interest.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 824. Requirement for adequate service

1. Every cable television company shall provide safe, adequate and reliable service in accordance with applicable laws, regulations, and franchise requirements.

2. Whenever, upon complaint or upon its own motion, and after public notice and opportunity for hearing, the commission finds that, despite its economic feasibility, the construction or operation of a franchised or certificated cable television system has been unreasonably delayed or that the extension of service to any persons or area within a cable television company's territory has been unreasonably withheld, it may order such construction, operation or extension on such terms and conditions as it deems reasonable and in the public interest.

3. Whenever, upon complaint or upon its own motion, and after public notice and opportunity for hearing, the commission finds that a cable television company is not meeting the service requirements and obligations imposed by this article, by the regulations promulgated hereunder, or by its franchise, it may order compliance therewith on such terms and conditions as it deems reasonable and in the public interest.

4. Failure to comply with an order of the commission issued under subdivisions two or three shall be grounds for denial, suspension or revocation of the right to exercise a franchise or to operate pursuant to a certificate of confirmation.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 825. Rates

1. Except as otherwise provided in this section, the rates charged by a cable television company shall be those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories.

2. Such rates may not be changed except by amendment of the franchise.

3. Notwithstanding subdivision one, (a) no rate provision in any franchise shall bind a municipality for more than ten years and no rate provision in any renewed franchise shall bind a municipality for more than five years. In the event that an existing franchise purports to bind a municipality with respect to rates for a period to expire after January first, nineteen hundred eighty-three, such provisions shall have no further force or effect after January first, nineteen hundred eighty-three; and (b) any rate or rates found by the commission, after public notice and opportunity for hearing, to be discriminatory or preferential as between subscribers similarly situated shall thereafter be void. Re-

EXECUTIVE LAW

§ 826

duced rates or free service to government, educational or charitable institutions shall not be considered unduly discriminatory or preferential.

4. In the event the commission finds that any rate is discriminatory or preferential pursuant to paragraph (b) of subdivision three of this section or that any cable television company is in violation of an order issued by the commission pursuant to section eight hundred twenty-four of this article requiring adequate service, it may issue an order requiring the municipality and the cable television company to provide for new rates which are non-discriminatory and non-preferential or reduced to reflect the inadequate service, as the case may be.

5. In addition to other powers, the commission may, after public notice and opportunity for hearing, prescribe rates for cable television service whenever:

(a) existing rates have been found discriminatory or preferential and, after reasonable opportunity, the municipality and the cable television company have not provided for new rates which are non-discriminatory or non-preferential, as provided in subdivision four of this section;

(b) a cable television company is in violation of an order issued by the commission pursuant to section eight hundred twenty-four of this article requiring adequate service and, after reasonable opportunity, the municipality and the cable television company have not provided for new rates reduced to reflect the inadequate service, in which case the commission may require appropriate rate reductions;

(c) having reduced rates pursuant to paragraph b, the commission finds that the cable television company has substantially remedied the deficiencies, in which case the commission shall return the rates to those rates stipulated in the franchise;

(d) upon complaint of any interested party and after reasonable opportunity for negotiation between the municipality and the franchisee, it finds that rates are not established by or pursuant to the terms of the franchise, in which event, the commission shall fix rates at a level comparable to rates fixed in comparable franchises requiring comparable service for comparable service areas; and

(e) upon request by a municipality and cable television company that the commission prescribe applicable rates, made in such manner as the commission by regulation may prescribe and certifying that they are unable to agree upon rates to include in any franchise or renewal thereof, in which event the commission shall fix rates at a level comparable to rates currently being fixed in cable television franchises for comparable service in comparable service areas; provided that if the municipality and the company thereafter agree upon rates, such agreed rates shall become effective.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, §§ 4, 5.

1972 Amendment. Subd. 4. L.1972, c. 467, § 4, eff. Jan. 1, 1973, inserted "and the cable television company."

Subd. 5. L.1972, c. 467, § 5, eff. Jan. 1, 1973, substituted "and the cable television company have" for "has" in pars. (a) and (b).

Effective Date. Section 4 of L. 1972, c. 466, renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 826. Abandonment of service

1. No cable television company, notwithstanding any provision in a franchise, may abandon any service or portion thereof without having given six months' prior written notice to the commission and to the franchisor, if any, and to the municipalities it serves.

2. When abandonment of any service is prohibited by a franchise, no cable television company may abandon such service without written consent of the franchisor, if any, and the commission. In granting such consent, the commission may impose such terms, conditions or

§ 826

EXECUTIVE LAW

requirements as in its judgment are necessary to protect the public interest.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, § 6.

1972 Amendment. Subd. 1. L.1972, c. 467, § 6, eff. Jan. 1, 1973, inserted "company."

Effective Date. Section 4 of L.1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 827. Termination of franchises

1. A franchise shall terminate at the expiration of its term or otherwise in accordance with the provisions thereof, unless, prior thereto, the commission otherwise orders. The commission may so order only if it finds, after public notice and opportunity for a hearing, that the franchisee:

a. has committed a material breach of its franchise or any applicable provisions of this article or of the regulations promulgated hereunder and has failed, without reasonable justification, to cure said breach within sixty days after having received written notice thereof from the commission, or

b. has been adjudicated a bankrupt or has filed a voluntary petition for bankruptcy or reorganization or for an order protecting its assets from the claims of creditors and the commission finds that termination of the franchise or certificate of confirmation under such conditions is in the best interests of the public.

2. Upon termination of a franchise or certificate of confirmation, the cable television company shall dispose of its facilities in accordance with the provisions of the franchise or certificate. However, on motion of any interested party or upon its own motion, and after public notice and opportunity for hearing, if the commission finds that the continued presence of the facilities in any public thoroughfare would pose a nuisance to the municipality or its residents, the cable television company shall remove its facilities within such period as the commission shall order. In the absence of any applicable franchise or certificate provision or order by the commission to the contrary, the cable television company may abandon its facilities.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L.1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 827-a. Forfeiture

1. Every cable television company, and all officers, agents and employees of any cable television company shall obey, observe and comply with every order, direction or requirement made by the commission, under authority of this article, so long as the same shall be and remain in force. Except as provided in subdivision two of this section, any cable television company which shall violate any provision of this article, or which fails, omits or neglects to obey, observe or comply with any order or any direction or requirement of the commission, shall forfeit to the people of the state of New York a sum to be set by the commission not to exceed one thousand dollars for each and every offense; every violation of any such order or direction or requirement, or of this article, shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

2. Notwithstanding subdivision one of this section, any cable television company which (a) shall fail to make and file its annual report as and when required or within such extended time as the commission may allow, or (b) shall fail to make specific answers to any question within the period specified by the commission for the making and filing of such answers, or (c) shall fail to submit such special reports as the commission may from time to time require, within the period specified by the

EXECUTIVE LAW

§ 828

commission for the submission thereof, shall forfeit to the state the sum of one hundred dollars for each and every day such company shall continue to be in default with respect to such annual report, answer, or special report.

3. An action to recover a forfeiture under subdivisions one or two of this section may be brought at any time within one year after the cause of action accrues, in any court of competent jurisdiction in this state, in the name of the people of the state of New York, on the relation of the commission. In any such action all forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture. All monies recovered in any such action, together with the costs thereof, shall be paid into the state treasury to the credit of the general fund.

Added L.1974, c. 441, § 1; amended L.1974, c. 442, § 1.

1974 Amendment. Subd. 3. L. 1974, c. 442, § 1, eff. on the 60th day after May 23, 1974, eliminated provisions which required actions to recover forfeitures to be commenced and prosecuted by the commission.

Effective Date. L.1974, c. 441, § 2, provided that this section shall take effect on the 60th day after May 23, 1974.

§ 828. Landlord-tenant relationship

1. No landlord shall a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

- i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;
- ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and
- iii. that the cable television company and the tenant agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

2. Rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

3. No cable television company may enter into any agreement with the owners, lessees or persons controlling or managing buildings served by a cable television, or do or permit any act, that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment.

Added L.1972, c. 466, § 1; amended L.1972, c. 467, § 7.

1972 Amendment. Subd. 1, par. b. L.1972, c. 467, § 7, eff. Jan. 1, 1973, inserted "from any tenant" and added "or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable."

Effective Date. Section 4 of L. 1972, c. 466; renumbered 5 and amended L.1972, c. 467, § 8, provided that this section is effective Jan. 1, 1973.

§ 829**EXECUTIVE LAW****§ 829. Censorship prohibited**

1. The commission may not prohibit or limit any program or any class or type of program or otherwise censor the communications or signals transmitted by any cable television company or over any cable television system, and may not promulgate any regulation or condition which would interfere with the right of free speech by means of cable television.

2. No municipality may prohibit or limit any program or class or type of program or impose discriminatory or preferential franchise fees in any manner that would tend to encourage or discourage programming of any particular nature, directly or indirectly.

3. No cable television company may prohibit or limit any program or class or type of program presented over a leased channel or any channel made available for public access or educational purposes.
Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 830. Liability for obscenity, defamation and invasion of privacy

Neither the cable television company whose facilities are used to transmit a program produced by a person other than such cable television company pursuant to the provisions of this article or of federal law or of applicable regulations, nor the officers, directors or employees of any such cable television company shall be liable for damages arising from any obscene or defamatory statements or actions or invasion of privacy occurring during any program when such company does not originate or produce such program.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

§ 831. Invalid provisions

If any provision of this article or the application of such provision to any circumstance is held invalid for any reason whatsoever, the remainder of this article or the application of the provision to other circumstances shall not be affected thereby.

Added L.1972, c. 466, § 1.

Effective Date. Section 4 of L. that this section is effective Jan. 1, 1972, c. 466; renumbered 5 and 1973.
amended L.1972, c. 467, § 8, provided

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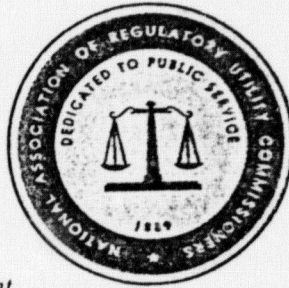
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PAUL RODGERS
Administrative Director
General Counsel



October 28, 1977

A. Daniel Fusaro
Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Brookhaven Cable TV, Inc.,
et al. v. Robert F. Kelly,
et al., No. 77-6156, 77-6157

Dear Sir:

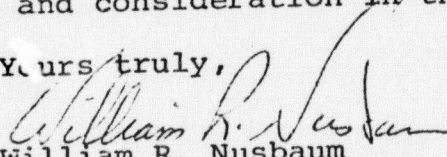
Enclosed for filing in the above-captioned case are the original and eleven (11) copies of the initial brief of the National Association of Regulatory Utility Commissioners on appeal from a decision of the U. S. District Court for the Northern District of New York. Two (2) copies of the brief have been mailed to each party in this proceeding.

Also enclosed are the three (3) copies of a decision of the U. S. Court of Appeals for the D. C. Circuit in Home Box Office, Inc. v. FCC, et al., No. 75-1280, cert. denied, No. 76-1841 (October 3, 1977). Decided on March 25, 1977, this case has yet to be officially reported, and due to the importance of the decision to the present appeal, we enclose it for the Courts' convenience and consideration.

Please stamp and return one copy of the brief to me at the above address.

Thank you for your cooperation and consideration in this matter.

Yours truly,


William R. Nusbaum
Deputy Assistant General Counsel

Enclosure:
cc: all parties